IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No. 1161 of 1999

For Approval and Signature:

HONOURABLE MR.JUSTICE J.M.PANCHAL
AND
HONOURABLE MR.JUSTICE H.B.ANTANI

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1 Whether Reporters of Local Papers may be allowed to see the judgment?

2 To be referred to the Reporter or not?

3 Whether Their Lordships wish to see the fair copy of the judgment?

4 Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 or any order made thereunder?

5 Whether it is to be circulated to the Civil Judge?

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MOHMAD @ AZAD RAHEMTULLA MOHMAD NAZIR MAHMED TAIAB - Appellant

Versus

STATE OF GUJARAT - Opponent

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Appearance :
MR DEEPAK M SHAH for the Appellant.
THROUGH JAIL for the Appellant.
MR ND GOHIL, ADDITIONAL PUBLIC PROSECUTOR for the Opponent.
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CORAM : HONOURABLE MR.JUSTICE J.M.PANCHAL
and
HONOURABLE MR.JUSTICE H.B.ANTANI

Date : 18/10/2005

ORAL JUDGMENT

(Per : HONOURABLE MR.JUSTICE J.M.PANCHAL)

1. Instant appeal filed, under Section 374 (2) of the Code of Criminal Procedure, 1973, is directed against judgment dated September 30, 1999 rendered by the learned

Additional Sessions Judge, Court No. 22, Ahmedabad in Sessions Case No. 137 of 1998, by which the appellant is convicted under Sections 8 (c) and 20 (b) read with Section 21 of the Narcotic and Psychotropic Substances Act, 1985 (*"the Act"*, for short) and sentenced to suffer RI for 15 years and fine of Rs. 2,00,000/- (Rupees Two Lakhs Only), in default SI for 2 years.

2. The facts emerging from the record of the case are as under:

On or about February 1998, Mr. D. B. Barwalia was discharging duties as Police Inspector, Narcotic Cell, DCB, Ahmedabad City, at Gaekwad Haveli, Ahmedabad. On February 11, 1998, Mr. C. G. Bharwad, who was then PSI, informed PI Mr. Barwalia that he had received an information that a person named Mohammed alias Azad Shaikh, originally belonging to Bihar State and residing at Jamalpur, Ahmedabad, who had put on designed full-sleeve shirt of pink and blue colour as well as brown coloured pant, was to come from Ahmedabad Railway Station to Sarangpur Circle with a rexine bag carrying *charas* between 2.30 PM and 3.00 PM. On receipt of information from PSI Mr. Bharwad, PI Mr. Barwalia reduced the same into writing and made necessary report to his immediate

official superior i.e. Assistant Commissioner of Police. He, thereafter, asked Police Constable Dilipsinh to requisition services of two *panch-witnesses*. Police Constable Dilipsinh summoned two persons, namely, (i) Kirtibhai Bhatt and (ii) Omprakash Chaudhary. On interrogation by Mr. Barwalia, those summoned by Police Constable Dilipsinh expressed their willingness to act as *panch-witnesses*. Therefore, they were made known about the information which was received by PI Mr. Barwalia from PSI Mr. Bharwad. Before proceeding to the place indicated in the information, necessary articles, such as, papers, wax, seal, cord, etc. were collected and first part of *panchnama* was drawn at the Police Station itself. Thereafter, the members of the raiding party proceeded towards the place indicated in the information in a Government vehicle. The vehicle was stopped near Meghdoot Hotel and thereafter, the members of raiding party went to AMTS Depot, Sarangpur on foot and maintained a watch. At about 14-25 Hrs, a person answering the description given in the information was spotted coming from Railway Station. He was intercepted near *Adia Pir Ni Darga*. On interrogation, he disclosed his name to be Mohammed *alias* Azad Rehmatullah Shaikh residing at Shivalia, Khankha, Bihar (the appellant). PI Mr. Barwalia conveyed the information which was received

by him from Police Sub-Inspector Mr. Bharwad and informed the appellant that it was necessary to search the bag which he was carrying. Before effecting search of the rexine bag carried by the appellant, PI Mr. Barwalia offered the appellant to be searched in presence of a Magistrate or a Gazetted Officer, but the said offer was declined by the appellant. Thereupon, the bag carried by the appellant was searched. It resulted into find of big quantity of *charas*. In order to ascertain *prima facie* nature of the substance found from the possession of the appellant, PI Mr. Barwalia asked PSI Mr. Chudasama to summon an officer from FSL at the spot. At the same time, Head Constable Mohbatsinh was directed by PI Mr. Barwalia to summon a person to weigh the substance found from possession of the appellant. Head Constable Mohbatsinh secured services of Manojkumar Kalidas Solanki to weigh the substance. The weight of the substance found from the possession of the appellant was ascertained to be 12.800 Kgs. The officer of Mobile FSL also arrived at the place where the appellant was intercepted and was found in possession of *charas*. He conducted primary test with the help of his kit and opined that the substance found was *charas*. Out of the quantity of *charas* found from possession of the appellant, 100 Gms was taken out for preparing two

samples each of 50 Gms. The samples drawn were placed in small plastic boxes. Thereafter, the samples drawn were properly sealed, as required by law. PI Mr. Barwalia called upon the appellant to produce pass or permit authorising him to possess *charas*, but none could be produced by the appellant. The second part of the *panchnama* was drawn at the spot itself. PSI Mr. Chudasama reduced into writing his complaint. He handed over his complaint, *panchnama* drawn by PI Mr. Barwalia, *muddamal* articles, the appellant, etc. to Mr. PA Zala, who was then PSO of Police Station. Mr. Zala registered offences against the appellant and handed-over *muddamal* to Writer Head Ranchodbhai for safe custody. *Muddamal* was handed-over to FSL for analysis through Police Constable Mr. M. K. Pathak. The complaint lodged by PSI Mr. Pathak was investigated by PI Mr. Barwalia. PI Mr. Barwalia recorded statements of those persons who were found to be conversant with the facts of the case. The report of analysis indicated that the substance seized from possession of the appellant and analysed was *charas* within the meaning of the Act. On completion of investigation, the appellant was chargesheeted in the Court of learned Judge, City Sessions Court, Ahmedabad on the basis of which, Sessions Case No. 137 of 1998 was registered.

3. The learned Additional City Sessions Judge, Ahmedabad City, to whom the case was made over for trial, framed necessary charge against the appellant at Exh. 12. It was read over and explained to him. He pleaded not guilty to the same and claimed to be tried. The prosecution, therefore, examined: (i) *panch* Kirtikumar Ratilal Bhatt as PW 1, at Exh. 18; (ii) PSI Mr. Jagdishsinh Tumubha Chudasama as PW 2, at Exh. 25; (iii) Manojkumar Kalidas Solanki as PW 3, at Exh. 27 (iv) Officer of FSL, Mr. Gauridutt Dayanandji Sharma as PW 4, at Exh. 29; (v) PSI Mr. Chhaganbhai Jivabhai Bharwad as PW 5, at Exh. 31; (vi) PSI Mr. Pravinsinh Abaysinh Zala as PW 6, at Exh. 34; (vii) Crime Writer Ranchodbhai Vasrambhai Makwana as PW 7, at Exh. 37; (viii) Markand Kantilal Pathak as PW 8, at Exh. 39; (ix) Head Constable Mohbatsinh Juvansinh Zala as PW 9, at Exh. 41; (x) Reader in the office of Superintendent of Police, Crime Branch, Padamsinh Darjansinh Ramlavat as PW 10, at Exh. 44; and, (xi) PI Mr. Dineshkumar Bhimjibhai Parwada as PW 11, at Exh. 46, to prove its case against the appellant.

The prosecution also produced documentary evidence, such as: (i) *panchnama* of search of bag carried by the appellant as well as find of *charas* therefrom and seizure

of the same at Exh. 19; (ii) complaint lodged by PSI Mr. J.T. Chudasama, at Exh. 26; (iii) report of Mobile FSL, at Exh. 30; (iv) report of analysis, at Exh. 40; (v) report by PI Mr. D.B. Barwalia to Assistant Commissioner of Police, Crime Branch, Ahmedabad City, as contemplated by Section 42 (2) of the Act, at Exh. 45; (vi) extract of entry No. 46 from Police Station Diary maintained at DCB Ahmedabad indicating that information received was reduced into writing, at Exh. 49; (vii) document prepared by PI Mr. Barwalia indicating compliance of Section 50 of the Act, at Exh. 50; (viii) certificate issued by Mr. Solanki indicating that substance seized from possession of the appellant was weighed by him and that its weight was found to be 12.800 Kgs, at Exh. 51; (ix) seizure memo issued by PI Mr. Barwalia to the appellant, at Exh. 52; (x) arrest memo of the appellant, at Exh. 53; (xi)intimation given by PI Mr. Barwalia to Aminbhai Kureshi, who is relative of the appellant, informing that the appellant was arrested for commission of offence punishable under the Act, at Exh. 54; (xii) forwarding letter addressed by PI Mr. Barwalia to the officer-in-charge of DCB Police Station, communicating that along with the said letter, complaint, *muddamal*, etc. were handed-over to him, at Exh. 55; (xiii) report by PI Mr. Barwalia to Deputy Superintendent of Police, Crime

Branch, Gaikwad Haveli, Ahmedabad, under Section 57 of the Act, at Exh. 56; (xiv) report to the District Magistrate made by PI Mr. Barwalia, at Exh. 56, etc. in support of its case against the appellant.

4. After recording of evidence of prosecution witnesses was over, the learned Judge explained to the appellant the circumstances appearing against him in the evidence of the prosecution witnesses and recorded his further statement, as required by Section 313 of the Code of Criminal Procedure, 1973. In his further statement, the appellant claimed that a false case was foisted upon him by the Police. He produced his written statement for consideration of the Court, but did not lead any evidence in his defence.

5. On appreciation of evidence adduced by the prosecution, the learned Judge held that it was proved by the prosecution beyond reasonable doubt that on February 11, 1998, the appellant was found in possession of *charas* weighing 12.800 Kgs near Sarangpur Circle without pass or permit and had committed offences punishable under Sections 8 (c) and 20(b) read with Section 21 of the Act. The learned Judge noticed that mandatory provisions of Sections 42 and 50 of the Act were fully complied with by

PI Mr. Barwalia. According to the learned Judge, after raid, *muddamal* was kept in safe custody and had reached FSL intact. In view of abovereferredto conclusions, the learned Judge has convicted the appellant under Sections 8(c) and 20 (b) read with Section 21 of the Act and imposed sentence referred to earlier by judgment dated September 30, 1999, giving rise to instant appeal.

6. This Court has heard Mr. D.M. Shah, learned Counsel of the appellant and Mr. N.D. Gohil, learned Additional Public Prosecutor for the State, at length and in great detail. This Court has also undertaken a complete and comprehensive appreciation of all vital features of the case as well as the entire evidence on record with reference to broad and reasonable probabilities of the case.

7. The plea, that finding recorded by the learned Judge of the Trial Court that the appellant was found in possession of *charas* without pass or permit is contrary to the evidence and, is, therefore, liable to be set aside, is merely stated to be rejected. The testimony of *panch-witness* Mr. Kirtibhai Bhatt, which is recorded at Exh. 18, makes it evident that he was summoned to act as *panch-witness* and that in his presence, bag carried by

the appellant was searched by PI Mr. Barwalia, which resulted into find of *charas*, weighing 12.800 Kgs. Though the *panch-witness* has been cross-examined at length, nothing could be brought on record so as to impeach his credibility. The *panch-witness* has withstood test of cross-examination. The testimony of *panch-witness* gets complete corroboration from contents of contemporary document, namely, *panchnama*, produced by the prosecution at Exh. 19. Further, the case of the prosecution that the appellant was found in possession of *charas* without pass or permit stands satisfactorily established by the testimony of PSI Mr. J.T. Chudasama, who had filed complaint against the appellant. PSI Mr. Chudasama stands fully corroborated by contents of his complaint produced by the prosecution at Exh. 26. Further, the evidence of PI Mr. Barwalia also establishes that the appellant was found in possession of big quantity of *charas* without pass or permit. The finding recorded by the learned Judge of the Trial Curt that the appellant was found in possession of *charas* without pass or permit is borne out from the evidence led by the prosecution. The learned Counsel of the appellant has failed to point out as to in which manner the said finding is erroneous. Under the circumstances, the said finding, being eminently just, is hereby upheld.

8. The plea, that provisions of Section 50 of the Act are not complied with and, therefore, the impugned judgment deserves to be reversed, has also no substance. The evidence on record establishes that what was searched by PI Mr. Barwalia was rexine bag carried by the appellant and not person of the appellant. In such a case, provisions of Section 50 of the Act would not apply at all. This is so in view of the decision of the Supreme Court in **State of H. P. Vs. Pawan Kumar, (2005) 4 SCC 350.** Even otherwise, the evidence on record clinchingly establishes that mandatory provisions of Section 50 of the Act were complied with by PI Mr. Barwalia. The testimony of *panch-witness* Mr. Bhatt, recorded at Exh. 18, makes it evident that before effecting search of rexine bag carried by the appellant, PI Mr. Barwalia had offered the appellant to search the bag in presence of a Magistrate or a Gazetted Officer, but the said offer was declined by him. This fact is stated by PSI Mr. J.T. Chudasama also, whose testimony is recorded at Exh. 25. The fact that offer, as contemplated by Section 50 of the Act, was made by PI Mr. Barwalia and declined by the appellant, is also mentioned in contemporary documents, namely, *panchnama* of seizure of

offending substance as well as complaint lodged by PSI Mr. Chudasama. Further, the prosecution has produced document prepared by PI Mr. Barwalia to establish that provisions of Section 50 of the Act were complied with. That document is at Exh. 50. The contents of said document also establish that provisions of Section 50 of the Act were complied with. Moreover, the fact that provisions of Section 50 of the Act were complied with is firmly and assertively stated by PI Mr. Barwalia in his testimony recorded at Exh. 46, which is not shown to be false at all. Thus, evidence on record establishes beyond pale of doubt that provisions of Section 50 of the Act were complied with by PI Mr. Barwalia before effecting search of bag carried by the appellant. Therefore, no benefit can be given to the appellant on the ground that mandatory provisions of Section 50 of the Act were not complied with.

Similarly, the plea, that provisions of Section 42 were not complied with and, therefore, the appellant should be acquitted, is devoid of merits. It may be stated that in this case, neither a building nor a conveyance nor an enclosed place was searched and, therefore, provisions of Section 42 would not apply in

view of catena of decisions rendered by the Supreme Court on the point. However, what is relevant to notice is that on receipt of information from PSI Mr. C.G. Bharwad, the information was reduced into writing, which is quite evident from contents of entry produced by the prosecution at Exh. 49. Further, necessary report, as contemplated by Section 42 (2) of the Act, was made by PI Mr. Barwalia to his immediate official superior, which is produced at Exh. 47. Thus, there is no manner of doubt that mandatory provisions of Section 42 were complied with and it is wrong to contend that those mandatory provisions were not complied with after receipt of information.

The contention, that the appellant could not have been convicted under Sections 8 (c) and 21 of the Act and, therefore, the conviction of the appellant for commission of those offences should be set aside, deserves acceptance. Mr. N. D.Gohil, learned Additional Public Prosecutor for State, could not convince the Court that the appellant was liable to be convicted under the provisions of Section 8 (c) and Section 21 of the Act. Section 8 of the Act prohibits certain operations, but does not provide punishment. Therefore, the learned Judge was not justified in convicting the appellant under

Section 8 (c) of the Act. Further, Section 21 of the Act prescribes punishment for contravention of any of provisions of the Act or any Rule or Order made in relation to manufactured drugs and preparations. The learned Counsel of the State Government could not convince the Court that *charas,* which was found from the possession of the appellant, was either manufactured drug and / or preparation withing the meaning of Section 2 (xi) of the Act. Therefore, the conviction of the appellant under Section 8 (c) and Section 21 of the Act is liable to be set aside.

The last submission made by the learned Counsel of the appellant is that the punishment of 15 years imposed on the appellant is harsh in the facts of the case, and, therefore, the same should be reduced suitably. In reply to this contention, the learned Additional Public Prosecutor for the State has relied upon the principle laid down by the Supreme Court in **Union of India Vs. Kuldeep Singh, AIR 2004 SC 827** to contend that the punishment imposed on the appellant is proper, and as judicial discretion vested in the Trial Court is exercised not arbitrarily, but judiciously, the sentence imposed on the appellant should not be reduced by this Court.

It is true that imposition of sentence without considering its effect on the social order, in many cases, may be in reality a futile exercise, and the social impact of the crime e.g. where it relates to offences relating to narcotic drugs or psychotropic substances, which have great impact not only on the health fabric, but also on the social order and public interest, cannot be lost sight of and *per se* require exemplary treatment. It is also true that any liberal attitude by imposing meagre sentences or taking too sympathetic view merely on account of lapse of time or personal inconveniences in respect of such offences will be result-wise counter-productive in the long run and against societal interest, which needs to be cared for and strengthened by string of deterrence in-built in the sentencing system. However, bad antecedents of the appellant have not been brought on record by the prosecution. Further, the learned Judge of the Trial Court has imposed punishment of fine of Rs. 2 Lakhs, in default SI for 2 years, and record does not indicate that by this time, the appellant has deposited fine. Under Section 20 (b)(ii) of the Act, the minimum punishment prescribed by the legislature before the amending Act No. 9 of 2001 was 10 years. The grounds pleaded by the

appellant before the Trial Court for imposing lesser punishment deserve consideration. On the facts and in the circumstances of the case, this Court is of the opinion that interest of justice would be served if minimum punishment of RI for 10 years, prescribed for commission of offence punishable under Section 20 (b)(ii) of the Act, is imposed on the appellant for commission of offence punishable under Section 20 (b) (ii) of the Act.

9. For the foregoing reasons, the appeal partly succeeds. Judgment dated September 30, 1999 rendered by learned Additional City Sessions Judge, Court No. 22, Ahmedabad City in Sessions Case No. 137 of 1988, convicting the appellant under Section 20(b)(ii) of the N.D.P.S. Act, 1985 is upheld, and for commission of said offence, the appellant is sentenced to RI for 10 years and fine of Rs. 2,00,000/- (Rupees Two Lakhs Only), in default SI for 2 years. The conviction of the appellant under Section 8 (c) and Section 21 of the N.D.P.S. Act, 1985, recorded by the learned Judge *vide* judgment dated September 30, 1999 in Sessions Case No. 137 of 1988, is hereby set aside. The appeal stands allowed only to the extent indicated hereinabove. *Muddamal* be disposed of in terms of the directions issued by the learned Judge in the impugned judgment.

[J. M. PANCHAL, J.]

[H. B. ANTANI, J.]

/shamnath